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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CALIFORNIA PHYSICIANS' SERVICE, Plaintiff and Respondent, v. MICHAEL JOHNSON, Defendant and Appellant.	B279183 (Los Angeles County Super. Ct. No. BC 600453)

APPEAL from a judgment of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed in part and reversed in part with directions.

Rothner, Segall & Greenstone, Glenn Rothner, Hannah Weinstein; Altshuler Berzon, Jeffrey B. Demain, and Megan Wachspress for Defendant and Appellant.

Manatt, Phelps & Phillips, Gregory N. Pimstone, Joanna S. McCallum, and Esra A. Hudson for Plaintiff and Respondent.

Xavier Becerra, Attorney General, Edward C. DuMont, Solicitor General, Janill L. Richards, Principal Deputy Solicitor General, Diane Shaw, Assistant Attorney General, Aimee Feinberg, Deputy Solicitor General, and Molly K. Mosley, Deputy Attorney General, for Amicus Curiae California Department of Insurance on behalf of Defendant and Appellant.

California Physicians Service, which does business as Blue Shield of California (Blue Shield) sued Michael Johnson (Johnson), a former Blue Shield employee, for causes of action arising from Johnson's post-employment retention of Blue Shield's documents and his disclosure of confidential information. Johnson filed a special motion to strike the complaint pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[1] The court denied the motion and Johnson appealed. We affirm in part and reverse in part, and direct the trial court to strike particular language in the complaint.

FACTS AND PROCEEDINGS BELOW

A. *Background*

Blue Shield hired Johnson in 2003 and promoted him to director of public policy in 2008. In that position, Johnson was responsible for making recommendations on how Blue Shield should respond to legislative and regulatory measures that affected the company. Johnson reported directly to attorney Tom Epstein—Blue Shield's vice president for public affairs—who in turn reported to the company's general counsel, Seth Jacobs. Johnson also worked directly with Jacobs. Johnson is not a lawyer.

According to Jacobs, he sought Johnson's views in developing his opinions and Blue Shield's legal positions, and he disclosed to Johnson his legal opinions and Blue Shield's positions on pending litigation, regulatory matters, and tax obligations. Johnson also collaborated with other Blue Shield in-house counsel on public policy matters.

In 2013, the Franchise Tax Board (the FTB) began examining Blue Shield's status as a tax-exempt social welfare

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[1] Unless otherwise specified, statutory references are to the Code of Civil Procedure.

organization.[2] Jacobs asked Johnson to help him formulate Blue Shield's strategy with respect to its tax exemption and its communications with the FTB. For this purpose, Jacobs provided Johnson with copies of Blue Shield's communications with the FTB. Blue Shield made these documents available only to its in-house attorneys and executives who needed to view them for their work.

In 2014, Johnson asked Jacobs for the remaining communications between Blue Shield and the FTB, including the FTB's tax audit findings. Jacobs provided the documents to Johnson.

In July 2014, Johnson told Jacobs he planned to write a memo regarding Blue Shield's " 'nonprofit status and mission.' " Johnson acknowledged to Jacobs that the FTB communications were confidential and privileged, and he asked Jacobs what he should do to protect the privilege. Jacobs told him to include in the memo a statement that Johnson prepared the memo at Jacobs's request to assist him "with the provision of legal advice." The memo, dated October 15, 2014 and addressed to Jacobs, discussed, among other matters, Blue Shield's legal structure, its legal obligations as a tax-exempt social welfare organization, and the FTB's findings regarding Blue Shield's tax exemption. During meetings regarding this memo, Jacobs disclosed to Johnson his opinion regarding Blue Shield's value, which Blue Shield had not publicly disclosed.

Around the same time, Johnson obtained non-public, confidential information about a plan for Blue Shield to acquire Care1st Health Plan (Care1st). Johnson and Jacobs had multiple discussions regarding the acquisition, during which they

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[2] Section 501(c)(4) of the Internal Revenue Code provides a tax exemption for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." (26 U.S.C. § 501(c)(4).)

addressed the structure of the transaction and Blue Shield's strategy for obtaining regulatory approval of the acquisition.

In early 2015, Johnson decided to leave Blue Shield and planned "to mount a public campaign to pressure Blue Shield to take its nonprofit mission more seriously." In February, he gave notice of his intent to resign, and set a final work date of March 13, 2015.

During the week before leaving Blue Shield, Johnson registered the web domains, makeitrightblueshield.com and makeitrightblueshield.org. He hired a consultant to help design a website, consulted with a friend who worked for a media and public relations firm, and spoke with reporters from the Los Angeles Times and the Wall Street Journal in order to generate coverage about the issues regarding Blue Shield's nonprofit status.

According to a forensic computer expert Blue Shield hired, two days before Johnson left Blue Shield, Johnson inserted a USB memory drive into the Blue Shield laptop computer he used and accessed several documents, including a folder labeled "[n]onprofit mission." Johnson denied downloading any Blue Shield documents onto a memory drive, but stated he "did move some personal documents to [his] personal computer prior to [his] departure and may have used a memory drive to do that."

After leaving Blue Shield, Johnson disclosed to a Los Angeles Times reporter and to the public via his website information that Blue Shield contends is confidential and privileged, including communications between Blue Shield and the FTB, information regarding Blue Shield's structuring of the Care1st acquisition, Blue Shield's value, and the retirement compensation paid to a former Blue Shield chief executive officer (CEO). Johnson also sent letters to the California Department of Managed Health Care (DMHC), requesting that the DMHC hold a hearing regarding the Care1st acquisition and asserting that

Blue Shield had made inconsistent representations to the FTB and the DMHC.

B. *Blue Shield's Complaint*

On November 6, 2015, Blue Shield filed a complaint against Johnson alleging causes of action styled as: (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) violation of Labor Code section 2860, (4) breach of fiduciary duty, (5) breach of duty of loyalty, and (6) violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.).

In support of the first two causes of action, Blue Shield alleged that Johnson breached his agreement to abide by Blue Shield's confidentiality policies and the implied covenant of good faith and fair dealing in two ways by "retaining confidential and attorney-client privileged documents belonging to Blue Shield after his resignation from the company"; and "disseminating confidential and privileged information." The alleged violation of Labor Code section 2860 occurred in the same two ways by "taking and retaining documents belonging to Blue Shield after his resignation and disclosing confidential and privileged information to the public." The breach of fiduciary duty cause of action is similarly based on both Johnson's taking—or "misappropriation"—of Blue Shield's documents and his "public dissemination of such information." The duty of loyalty was breached by Johnson's alleged "misappropriation" of documents "for the apparent purpose of improperly disclosing such information." Blue Shield's UCL cause of action incorporates all preceding allegations and alleges that such conduct constitutes unlawful business acts and practices within the meaning of the UCL.

For ease of reference, we will refer to the allegations and claims that Johnson possessed, took, retained, or misappropriated documents as the "document retention"

allegations and claims, and refer to the allegations and claims that Johnson divulged, disclosed, or disseminated confidential or privileged information as the "disclosure" allegations and claims.

The complaint's prayer for relief also distinguishes between the document retention and disclosure claims. With respect to the document retention claims, Blue Shield requested orders (1) prohibiting Johnson from "retaining" confidential and privileged documents he acquired from Blue Shield during his employment, and (2) requiring him to return any confidential or privileged documents in his possession and destroy any electronic copies of such documents. Regarding the disclosure claims, Blue Shield requested orders (1) prohibiting Johnson "from using or disclosing Blue Shield's confidential or privileged information," and (2) that Johnson cease and desist from using or disclosing such confidential documents and information.

After Blue Shield filed its complaint, Johnson posted on his website that he was "going to intensify [his] work exposing Blue Shield's misdeeds and abuse of its nonprofit status." When asked at his deposition in March 2016 whether he has considered disclosing "other nonpublic information," he answered, "Yeah," and explained that he has "considered a fuller discussion . . . about the concerns [he had] raised with Blue Shield" and Blue Shield's CEO's "response to those concerns."

C. *Johnson's Anti-SLAPP Motion*

On January 11, 2016, Johnson filed a special motion to strike Blue Shield's complaint pursuant to the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) In support of the motion, Johnson filed his declaration and excerpts from his diary, which, Blue Shield asserted, disclosed communications protected by the attorney-client privilege. On that basis, Blue Shield sought and obtained an order sealing the challenged parts of these documents.

After a hearing, the trial court denied the anti-SLAPP motion. The court observed that Johnson focused his motion on the disclosure allegations, and not on the document retention allegations. Johnson therefore "failed to establish the application of [the anti-SLAPP statute] to the [document retention] allegations." The court then explained that "[b]ecause each cause of action is supported by unprotected conduct, namely the wrongful retention of confidential information, each cause of action shall survive in part." The court therefore denied the motion "to the extent it seeks to strike the entirety of the [c]omplaint or the entirety of each cause of action."

With respect to the disclosure allegations, the court found that the alleged "disclosures clearly fall within the definition of protected activity" under the anti-SLAPP statute. As to the claims arising from the disclosure allegations, the court concluded that Blue Shield had met its burden of establishing the "minimal merit" necessary to pursue each claim.

DISCUSSION

I. Johnson's Anti-SLAPP Motion

A. *The Anti-SLAPP Statute*

The anti-SLAPP statute allows a defendant in a civil case to make a special motion to strike any "cause of action against a person arising from any act of [the defendant] in furtherance of the [defendant]'s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) A "cause of action," for purposes of this statute, does not mean a pleaded count denominated by the plaintiff as a "cause of action" in a complaint, but rather a claim for relief arising from particular acts of the defendant. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 392 (*Baral*).) Thus, a single pleaded count, though styled as a "cause of action," may include more than one cause of action for purposes

of the anti-SLAPP statute. To avoid confusion regarding these different meanings of "cause of action," our Supreme Court in *Baral* referred to the proper subject of an anti-SLAPP motion as "a 'claim.' " (*Id.* at p. 382.) We, like other post-*Baral* courts, will do the same. (See, e.g., *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1161, fn. 6; *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 591, fn. 6.)

Baral resolved an issue regarding judicial treatment under the anti-SLAPP statute of a so-called "mixed cause of action"; that is, a pleaded count that combines allegations of activity protected by the anti-SLAPP statute and allegations of unprotected activity. (*Baral*, *supra*, 1 Cal.5th at pp. 381-382.) The court rejected the view that anti-SLAPP motions did not apply to a claim based on protected activity that is combined with one or more claims based on unprotected activity. A defendant, *Baral* held, may move to strike "any claim for relief founded on allegations of protected activity," even if contained within a count that includes claims based on unprotected activity. (*Id.* at p. 382.) Claims based on unprotected activity, however, remain beyond the reach of the statute.

As *Baral* explained, moving defendants have the burden of identifying the allegations of activity that support the claims they seek to strike. (*Baral*, *supra*, 1 Cal.5th at p. 396.) The court must then determine whether that activity is protected by the anti-SLAPP statute. In making this determination, the "court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) If such activity is not protected, the motion is denied as to the claims supported by that activity; if the activity is protected, the court proceeds to the second step of the analysis. (*Baral*, *supra*, 1 Cal.5th at p. 396.)

At the second step, the plaintiff has the burden "to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The

court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken." (*Baral*, *supra*, 1 Cal.5th at p. 396.) More precisely, the "[a]llegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Ibid.*)

We review the trial court's ruling on the anti-SLAPP motion de novo. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.)

B. *First Prong—Arising from Protected Activity*

Johnson, as the moving defendant, had the initial burden of identifying all allegations of protected activity and the claims for relief they supported. (*Baral*, *supra*, 1 Cal.5th at p. 396.) Here, Johnson identified a single allegation of protected activity: "Since his resignation, Johnson has repeatedly publicly divulged confidential and attorney-client privileged information about Blue Shield's confidential corporate strategy, tax status, and legal strategies, including Blue Shield's confidential . . . executive compensation matters." As Blue Shield pointed out in its opposition to the motion, Johnson did not challenge the document retention allegations or the claims arising from them; it challenged the disclosure claims only. Accordingly, to the extent that the claims asserted in the complaint arise from the document retention allegations, they were not subjects of the anti-SLAPP motion.[3]

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[3] Blue Shield's fifth cause of action, for breach of duty of loyalty, is based solely on Johnson's alleged "misappropriation" of documents. Although Johnson allegedly misappropriated the documents "for the apparent purpose of improperly disclosing such information," the claim, as alleged, arises solely from the

Blue Shield does not dispute the trial court's finding that the disclosure claims arise from protected activity. Indeed, in light of the evidence showing that Johnson disclosed such information to the news media, the public, and the DMHC, and that the information pertained to issues concerning Blue Shield's tax status and its purchase of Care1st, the disclosure activity is protected under the anti-SLAPP statute as conduct within one or more of the following statutory definitions of protect activity: "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(2)–(4).) Therefore, the trial court properly proceeded to the second stage of the anti-SLAPP analysis as to the disclosure claims.

Although Johnson did not identify any of the retention allegations in his moving papers or argue that such activity constituted protected activity, he asserts on appeal that we should direct the court to strike such claims because his document retention activity was "in furtherance of" his free speech and petition rights. A defendant appealing from the denial of an anti-SLAPP motion, however, may not raise on appeal theories and arguments not presented to the trial court. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 321, fn. 10; *Bikkina v.*

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act of misappropriation, not from any disclosure of such information. It is thus a document retention claim. As such, Johnson's anti-SLAPP motion does not reach this claim and we do not address it.

Mahadevan (2015) 241 Cal.App.4th 70, 92.) We therefore decline to address this argument.

C. *Second Prong—Establishing a Probability of Prevailing on the Merits of the Disclosure Claims*

In the second step of the anti-SLAPP analysis "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, *supra*, 1 Cal.5th at p. 396.) "The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' " (*Id.* at pp. 384-385.)

1. *Breach of contract and implied covenant of good faith and fair dealing*

The first two causes of action in Blue Shield's complaint are for breach of contract and breach of the implied covenant of good faith and fair dealing. In particular, Blue Shield alleged that "[a]s a condition of his employment and his continued employment with Blue Shield, Johnson agreed to maintain the confidentiality of Blue Shield's confidential and privileged information." Johnson contends that he had no such contract with Blue Shield and, if he did, Blue Shield has not made a prima facie case that he breached the contract.

Formation of a contract requires mutual assent among the parties. (Civ. Code, §§ 1550, 1565; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270.) Blue Shield supports its allegation of a contract in part with statements included in its employee handbook and its code of business conduct, which restrict

employees from disclosing confidential information, and documents that Johnson signed in 2003 in which he acknowledged his receipt of the employee handbook and code of conduct and "agree[d] to abide" by them. It relies on *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, where the court stated: "[The employee] was offered employment on an at-will basis under the terms of the [e]mployee [h]andbook. [The employee] unequivocally accepted the offer of employment by commencing to work for [employer], for which he was paid. [The employee's] commencement of performance under the [e]mployee [h]andbook constituted assent to its terms. Under California law, assent to an offer can occur either by way of performance under the contract or the acceptance of consideration. . . . [The employee] cannot have it both ways, acceptance of the at-will job offer with all its emoluments and no responsibility to abide by one of its express conditions." (*Id.* at p. 384.)

As Johnson points out, however, the employee handbook also states: "Nothing in this [h]andbook, or any Blue Shield of California policies, rules or guidelines, or the Code of Business Conduct, is intended to be and is not a contract (express or implied), nor does it otherwise create any legally enforceable contractual obligations on the part of [Blue Shield]." Moreover, the acknowledgment of receipt of the employee handbook that Johnson signed states: "I understand that nothing in this handbook shall be construed to constitute an express or implied contract concerning any employment-related decision, or term or condition of employment."

Johnson's position that no contract had formed on the basis of the handbook and code of conduct alone is supported by *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781 (*Esparza*). In that case, a "welcome letter" accompanying an employee handbook included language similar to the "not a 'contract' " provision in Blue Shield's employee handbook. Because of that

language, the Court of Appeal concluded that other language in the employee handbook purporting to contractually bind the employee to arbitration was ineffective. Based in part on the rule that ambiguous language is construed against the drafter (Civ. Code, § 1654), the court explained that the "reasonable interpretation of the welcome letter is that it meant exactly what it said—that the handbook was not intended to create 'any legally enforceable obligations,' including a legally enforceable obligation to arbitrate." (*Esparza*, *supra*, 2 Cal.App.5th at p. 789.)

Esparza, however, does not address the situation where an employee subsequently agrees to abide by the employer's policies. Here, Blue Shield produced evidence, including Johnson's deposition testimony, that Johnson had, in the years prior to his departure, completed training courses regarding Blue Shield's code of conduct and privacy policies, and certified that he would abide by them. The material for these courses included the following statements: Blue Shield's assets include "unpublished financial data and reports, and other forms of valuable confidential and proprietary information." "Confidential [c]ompany information" is described as "sensitive or proprietary information about Blue Shield . . . that is generally not known to the public, must be protected from public disclosure and unauthorized internal disclosure. Examples include operational information, . . . business forecasts and strategies[,] and new business plans. [¶] Workforce members who possess or have access to confidential [c]ompany information must protect it and never: [¶] Disclose it to anyone outside the company unless you have formal authorization," or "[u]se it for personal benefit or the benefit of persons outside [Blue Shield]." Another training course document states that Blue Shield's "proprietary information includes information about how [the] company operates," and that "[a]ll information about the company and its operations should be safeguarded in a manner that will ensure its security

and confidentiality unless and until it is made publicly available by authorized representatives of the company."[4]

The evidence of Johnson's training course certifications that he would abide by Blue Shield's code of conduct and privacy policies are, under *Harris*, sufficient to establish a prima facie case for a contract between Johnson and Blue Shield even if, under *Esparza*, no such contract formed when Johnson was hired in 2003. By agreeing to abide by that code of conduct, Johnson agreed to not disclose to others Blue Shield's confidential information, which is defined to include "proprietary information about Blue Shield . . . that is generally not known to the public," and specifically includes "operational information" and "business forecasts and strategies." Contrary to Johnson's assertion otherwise, these terms are sufficiently certain to form the basis of an enforceable contract. (See 1 Witkin, Summary of Cal. Law (11th ed. 2018) Contracts, § 137, pp. 177-178; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811; see also *ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 312 [agreement that prevented employee from disclosing "any secret or confidential knowledge concerning any invention or other matter relating to the [c]ompany's business" was enforceable].)

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[4] Johnson contends that Blue Shield cannot rely on evidence of his post-training certifications because the only sources of the alleged contract specified in the complaint are the employee handbook and code of conduct. Blue Shield argues that the allegation of an agreement to maintain confidentiality is not limited to the specified documents, which are merely examples of sources of the contract. Even if the pleading needs to be amended to allege additional facts to show a probability of prevailing, however, Blue Shield may rely on evidence of such facts in opposing the motion. (See *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 872–873.)

The evidence produced by Blue Shield also satisfies its burden of making a prima facie factual showing that Johnson breached his contractual duty of maintaining the confidentiality of Blue Shield's proprietary information. In opposition to the anti-SLAPP motion, Blue Shield identified numerous disclosures and evidence of each. The disclosures are: (1) statements Blue Shield made in communications with the FTB regarding taxes; (2) information regarding Blue Shield's acquisition of Care1st; (3) Jacobs's opinion regarding the company's value; (4) the retirement compensation paid to a former CEO; (5) information that the FTB was examining Blue Shield's tax exemption and had initially revoked the exemption; and (6) Blue Shield's correspondence with the FTB regarding its tax exemption.

Regarding Blue Shield's communications with the FTB, Blue Shield provided Jacobs's declaration in which he stated that he sent to Johnson copies of communications between Blue Shield and the FTB so that Johnson could assist Blue Shield's legal department in developing its legal strategy vis-à-vis the FTB. As Blue Shield points out, the FTB is prohibited generally from publicly disclosing information, "including the business affairs of a corporation," contained in documents filed with the FTB under statutes governing tax returns, tax collections, and FTB audits. (See Rev. & Tax. Code, § 19542.) According to Jacobs, Johnson acknowledged that the communications were "confidential and privileged." Johnson admitted that he received these communications, including the FTB's tax audit of Blue Shield, and considered them to be "sensitive." Blue Shield also produced Johnson's deposition testimony, email exchanges between a Los Angeles Times reporter and Johnson, the reporter's subsequent articles, and printouts of Johnson's Internet blog that indicate that Johnson disclosed to the reporter and others some of the communications between Blue Shield and the FTB, including part of the tax audit findings. In one news article, the reporter

highlighted the nonpublic nature of Johnson's disclosures by noting that the FTB, "citing the confidentiality of taxpayer issues," "has denied public-records requests on Blue Shield."

Regarding the acquisition of Care1st, Jacobs stated in his declaration that he and Johnson had multiple discussions regarding Blue Shield's strategy for structuring and obtaining regulatory approval for the transaction. That strategy, Jacobs stated, was non-public information and had been disclosed only to a small number of Blue Shield's executives and in-house lawyers. Johnson admitted in his deposition that the information he received regarding the Care1st transaction was "commercially sensitive information," and was "confidential and not to be publicly revealed." Blue Shield also produced evidence of Johnson's Internet blog in which he describes the structure of the transaction and its "tax avoidance" strategy, and an email Johnson sent to the Los Angeles Times reporter with a link to his Internet blog report.

In light of this showing, we need not address the other four categories of disclosure that Blue Shield challenges. A jury could reasonably find that the communications between Blue Shield and the FTB and the information Johnson acquired regarding the Care1st transaction included confidential information subject to Johnson's agreement to maintain the confidentiality of "sensitive or proprietary information about Blue Shield . . . that is generally not known to the public," such as "operational information, . . . business forecasts and strategies[,] and new business plans." Blue Shield's evidentiary showing that Johnson had disclosed such information to others thus satisfies the prima facie showing of Johnson's breach of his contractual confidentiality obligations.

Johnson argues that Blue Shield has failed to demonstrate that Johnson's disclosures were protected by the attorney-client privilege or, if they were, that Blue Shield has waived the privilege. Although Blue Shield contends that some of the confidential information Johnson disclosed was protected by the

attorney-client privilege, its breach of contract causes of action are not dependent upon such protection. Indeed, the training courses Blue Shield relies upon as sources of Johnson's contractual obligations do not refer to information protected by the attorney-client privilege per se; rather, Johnson agreed to maintain the confidentiality of "sensitive or proprietary information about Blue Shield . . . that is generally not known to the public." Although attorney-client communications about Blue Shield's operations and business plans may be included in this description, the description is not limited to such communications. Thus, regardless of whether the information Johnson disclosed is protected by the attorney-client privilege, a jury could find that some or all of it was confidential and that Johnson therefore breached his contractual duties not to disclose it to others.

Johnson further argues that any injunctive relief against further disclosures by him would be unconstitutionally vague or overbroad. The argument is premature and speculative. As the trial court stated in response to this point, the "breadth of any injunction issued in this matter is to be determined after a trial on the merits, not at the pleading stage." (See *People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 323 [where cause of action is stated, argument that injunctive relief would be unconstitutional was inappropriate at the pleading stage].)

Based on the foregoing, Blue Shield has made the prima facie evidentiary showing necessary to defeat Johnson's anti-SLAPP motion as to the disclosure claims alleged in the breach of contract causes of action.

2. *Violation of Labor Code section 2860*

Blue Shield's third cause of action is labeled "[v]iolation of Labor Code [section] 2860," and is based upon Johnson's alleged "taking and retaining documents belonging to Blue Shield after

his resignation and disclosing confidential and privileged information to the public."

Johnson argues that Blue Shield has failed to state a legally sufficient claim for violation of Labor Code section 2860 because that statute "does not provide a private cause of action."[5] It is true that Labor Code section 2860 does not itself create a duty that would give rise to a cause of action; rather, it is a legislative declaration as to the employee's and employer's rights to property acquired in the employment relationship: "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment." (Lab. Code, § 2860.)

Although Labor Code section 2860 does not itself create a private right of action, its delineation of property rights is ordinarily a part of "every employment relationship." (*Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 826.) An allegation of such rights may support a cause of action when combined with allegations that an employee wrongfully took, retained, or misappropriated the employer's property (as delineated in the statute) under various theories, such as conversion, breach of loyalty, breach of contract, breach of fiduciary duty, or misappropriation of trade secrets and confidential information. (See generally 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading,

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[5] Although Blue Shield did not respond directly to this point in its respondent's brief, we reject Johnson's assertion that Blue Shield has thereby abandoned the claim. The trial court found that Blue Shield had satisfied its burden of showing minimal merit on this claim and, even in the absence of an argument to support that finding, we must still examine the record to evaluate Johnson's claims of error. (See *Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 505.)

§ 693, p. 111; *id*. at § 702, p. 118; 3 Witkin, Summary of Cal. Law (11th ed. 2018) Agency and Employment, § 109, p. 166; Chin et al., Cal. Practice Guide Employment Litigation (The Rutter Group 2019) §§ 14:250–14:253, pp. 14.36–14.37; (see also *Empire Steam Laundry v. Lozier* (1913) 165 Cal. 95, 102 [employment relationship implies a " 'contract that an employee will not divulge confidential knowledge gained in the course of his employment, or use such information to his employer's prejudice' "].) Here, Blue Shield, by alleging that Johnson took, retained, and disclosed its documents and confidential information has stated legally sufficient claims under one or more of the foregoing theories.

Although Blue Shield labeled its third cause of action, "Violation of Labor Code [section] 2860," the label is not controlling. It is "an elementary principle of modern pleading[s] that the nature and character of a pleading is to be determined from its allegations, regardless of what it may be called, and that the subject matter of an action and issues involved are determined from the facts alleged rather than from the title of the pleadings." (*McDonald v. Filice* (1967) 252 Cal.App.2d 613, 622; accord, *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387; *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1281.) Because the allegations under the third cause of action, regardless of its label, support a cause of action, Blue Shield has stated legally sufficient claims for relief: Johnson wrongfully disclosed Blue Shield's property (as defined in Lab. Code, § 2860), for which Blue Shield requests injunctive relief. (See, e.g., *Santa Monica Ice etc. Co. v. Rossier* (1941) 42 Cal.App.2d 467, 470 [under Labor Code section 2860, confidential information employee acquired in the course of his employment belonged to the employer, and the employee's disclosure " 'is a breach of trust,' " which a court may restrain].) The same evidence that supports Blue Shield's disclosure-based breach of contract claims

satisfies its burden of establishing a prima facie case on the merits of its third cause of action.

3. *Breach of duty of fiduciary duty*

" ' "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." ' " (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114.) Johnson contends that Blue Shield has failed to make the requisite prima facie showing that he owed a fiduciary duty to Blue Shield to maintain its confidential information or, if such a duty existed, that he breached it. We disagree.

California courts have identified certain relationships as fiduciary relationships. Corporate officers and directors, for example, "stand in a fiduciary relation to the corporation and its stockholders" (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 345), as do partners and joint venturers (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524) and controlling shareholders vis-à-vis the minority shareholders of a corporation (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108; *Le v. Pham* (2010) 180 Cal.App.4th 1201, 1211.) "But entirely apart from such instances, a fiduciary status may exist as a matter of fact where it would not otherwise be inferred from the mere relationship of the parties." (*Sime v. Malouf* (1949) 95 Cal.App.2d 82, 98.) Thus, although, as Johnson asserts, "[a] bare employee-employer relationship" does not ordinarily create a fiduciary duty (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1391), employees do owe a fiduciary duty when they accept "a position of trust and confidence with their employer." (Rest., Employment, § 8.01(a), p. 395; see *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 417 ["A fiduciary duty is undertaken by agreement when one person enters into a

confidential relationship with another."].) Whether the employee was in such a position of trust and confidence is a question of fact. (*Ibid.*)

Here, Blue Shield alleged that Johnson, by "virtue of his position of trust and confidence at Blue Shield, . . . participated in the management of corporate affairs, exercised discretionary authority, and was privy to highly confidential and/or attorney-client privileged information about Blue Shield. As a result, Johnson owed Blue Shield a fiduciary duty of confidentiality." Because this allegation avers that Johnson held a position of trust and confidence with respect to "highly confidential" information, it adequately pleads the existence of a fiduciary duty.

Blue Shield has supported the allegation with a sufficient prima facie evidentiary showing. According to Jacobs, Blue Shield's General Counsel, Johnson helped formulate Blue Shield's legal strategy regarding the company's tax exemption and reviewed confidential communication's between Blue Shield and the FTB, including the FTB's nonpublic audit of Blue Shield. Jacobs also disclosed to Johnson confidential information regarding the structure of the proposed acquisition of Care1st and Jacob's opinion of the company's value. These facts, which we must assume are true, establish a prima facie showing of a fiduciary relationship with respect to such confidential information. The facts that support the breach of contract claims discussed above also support the breach of a fiduciary duty.

4. *Violation of Unfair Competition Law*

In its sixth cause of action, Blue Shield alleges that Johnson's conduct, in disseminating confidential information, "constitutes unlawful business acts and practices" under the UCL. (Bus. & Prof. Code, § 17200.) Blue Shield has failed to carry its burden with respect to this claim because it has

presented no evidence that Johnson's activities constitute business acts and practices.

Courts have defined unlawful business activity under the UCL somewhat circularly, as " ' " 'anything that can properly be called a business practice and that at the same time is forbidden by law.' " ' " (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 519.) Courts have been careful not to expand the scope of the UCL to noncommercial settings. As the court explained in *That v. Alders Maintenance Assn.* (2012) 206 Cal.App.4th 1419 (*That*), "[t]he UCL's purpose does not require [a] broad construction of the word 'business.' 'The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.' " (*Id.* at p. 1427.) Indeed, " 'noncommercial speech' " that is "entitled to full First Amendment protection" is "not actionable under Business and Professions Code sections 17200 or 17500." (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 343.)

A noncommercial entity may be liable under the UCL, however, to the extent it engages in commercial activity. For example, in *That*, *supra*, 206 Cal.App.4th at page 1427, the court held that although a nonprofit homeowners association could not be liable under the UCL for activities pertaining to its elections, "it might be liable for such acts under the UCL" if it "decided to sell products or services that are strictly voluntary purchases for members or nonmembers." (*Ibid.*) And in *Pines v. Tomson* (1984) 160 Cal.App.3d 370, the court applied the UCL to a nonprofit religious corporation because of its " 'business practice' " of printing and selling advertising in a publication called the Christian Yellow Pages. (*Id.* at p. 386.)

Although the question whether a particular act is business-related is ordinarily a question of fact (*People v. E.W.A.P., Inc.*, *supra*, 106 Cal.App.3d at pp. 320–321), Blue Shield has presented no evidence to suggest that Johnson's

conduct had any commercial character. His employment relationship with Blue Shield had terminated prior to the alleged unlawful disclosures. Although he must have spent some money to fund his website and pay for incidental expenses of his "campaign to pressure Blue Shield to take its nonprofit mission more seriously," it does not appear that he sought to sell the information he disclosed or any "campaign" merchandise. There is, in short, no evidence to support a claim that Johnson's allegedly unfair or unlawful conduct had any connection to any commercial activity or constituted a business practice for purposes of the UCL. Blue Shield has not, therefore, established a prima facie factual showing sufficient to sustain a favorable judgment on this claim.

5. *The Noerr-Pennington defense*

Johnson contends that his actions were protected by the *Noerr-Pennington*[6] doctrine. This doctrine, which originated in federal antitrust cases, "provides that 'those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct.' " (*Kearney v. Foley & Lardner, LLP* (9th Cir. 2009) 590 F.3d 638, 643–644.) Even if we assume, without deciding, that this doctrine could be asserted as a defense to Blue Shield's claims, Johnson has failed to establish that the defense would defeat such claims as a matter of law. (See *Baral*, *supra*, 1 Cal.5th at p. 385 [court "evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law"].)

When the defense is available, it applies not only to a defendant's direct petitioning activity, such as filing a lawsuit, but also to conduct that is "incidental" to petitioning activity

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[6] *Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127 (*Noerr*); *Mine Workers v. Pennington* (1965) 381 U.S. 657 (*Pennington*).

and other "valid effort[s] to influence governmental action." (*Allied Tube & Conduit Corp. v. Indian Head, Inc.* (1988) 486 U.S. 492, 499, 502 (*Allied Tube*); *Sosa*, *supra*, 437 F.3d at p. 934.) Activity incidental to petitioning and protected under the *Noerr-Pennington* doctrine includes a litigant's conduct during discovery proceedings (*Freeman v. Lasky, Haas & Cohler* (9th Cir. 2005) 410 F.3d 1180, 1184), pre-litigation demand letters (*Sosa*, *supra*, 437 F.3d at p. 942), the decision to accept or reject a settlement offer (*Columbia Pictures v. Professional Real Estate Inv.* (9th Cir. 1991) 944 F.2d 1525, 1528–1529), and pre-litigation investigation (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1069).

Conduct that is not itself petitioning activity may also be protected under the *Noerr–Pennington* doctrine if it is "genuinely intended to influence government action." (*Allied Tube*, *supra*, 486 U.S. at p. 503.) In *Noerr*, for example, an association of railroads conducted a publicity campaign intended to influence legislation favorable to the railroads. Although the railroads did not petition the government, the Supreme Court held that the campaign was immune from federal antitrust action because "all the evidence [regarding the campaign] deal[t] with the railroads' efforts to influence the passage and enforcement of laws." (*Noerr*, *supra*, 365 U.S. at p. 142.)

Of course, not all efforts to influence government action are protected under the *Noerr-Pennington* doctrine or the Constitution. (*Allied Tube*, *supra*, 486 U.S. at p. 503.) Bribery is an "effective means of influencing government officials," but it does not "merit[] protection." (*Id.* at p. 504.) Nor does perjury, despite its direct connection to petitioning activity. (*California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 512.) Whether challenged activity is protected under the *Noerr-Pennington* doctrine on the ground that it was intended to

influence governmental action depends on an examination of "the context and nature of the activity."[7] (*Allied Tube*, *supra*, 486 U.S. at pp. 504, 507–508 & fn. 10; see *Venetian Casino Resort, L.L.C. v. N.L.R.B.* (D.C. Cir. 2007) 484 F.3d 601, 612.) Applying this test to the railroads' campaign of publicity in *Noerr*, the Supreme Court explained that the campaign's "essential character" was "political, and could not be segregated from the activity's impact on business"; indeed, the campaign was "a classic 'attempt . . . to influence legislation.' " (*Allied Tube*, *supra*, 486 U.S. at p. 505.)

In *Coalition for ICANN Transparency, Inc. v. VeriSign* (9th Cir. 2010) 611 F.3d 495, by contrast, the defendant not only filed a lawsuit against a third party, but also hired lobbyists and others to advocate its position against the third party, "paid bloggers to attack [the third party's] reputation, [and] planted news stories critical of [the third party] in mainstream media." (*Id.* at p. 505.) Although the defendant's filing of the complaint constituted petitioning activity, the Ninth Circuit held that the *Noerr-Pennington* doctrine did not immunize the defendant from the "activities that accompanied that litigation." (*Id.* at pp. 505-506.)

Whether a defendant's challenged conduct, in light of its context and nature, was intended to influence governmental action for the purpose of the *Noerr-Pennington* doctrine is ordinarily a factual issue. (See *Rodime PLC v. Seagate*

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[7] Justice White, in dissent, criticized this test as "vague" and "[un]workable," and stated that "[C]ourts of [A]ppeals will be obliged to puzzle over claims raised under the [*Noerr-Pennington*] doctrine without any intelligible guidance about when and why to apply it." (*Allied Tube*, *supra*, 486 U.S. at p. 513 (dis. opn. by White, J.).) In response, the majority noted that the dissent "fail[ed] to offer an intelligible alternative." (*Allied Tube*, *supra*, 486 U.S. at pp. 507-508, fn. 10.)

Technology (Fed. Cir. 1999) 174 F.3d 1294, 1307; *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.* (8th Cir. 1982) 693 F.2d 733, 746.) The question may be determined as a matter of law only if reasonable persons could come to only one conclusion.

Here, Johnson's disclosure to news reporters and the public via his website are not comparable to activity that courts have found to be incidental to petitioning rights, such as prelitigation demand letters or investigations. And, in contrast to the facts in *Noerr*, Johnson's "campaign" was not directed exclusively at influencing legislation or other governmental action. Although he sent letters to the DMHC regarding Blue Shield's proposed Care1st acquisition, the evidence reveals that this was only one aspect of his self-described plan to conduct a "public campaign to pressure Blue Shield to take its nonprofit mission more seriously." Significantly, there is nothing in Blue Shield's complaint or in the evidence it submitted in connection with the anti-SLAPP motion that indicates its claims arise from Johnson's interactions with the DMHC. Indeed, the disclosures it identifies as the source of its claims were primarily to a Los Angeles Times reporter and made on Johnson's website; other disclosures were made "to other journalists, consumer groups, political staff, and third parties."

At a minimum, there are factual issues concerning the context and nature of Johnson's campaign and, therefore, he has failed to establish his entitlement to the *Noerr-Pennington* defense as a matter of law.

6. *Public policy arguments*

Johnson and amicus curiae contend that any agreement he made to maintain the confidentiality of Blue Shield's information is void as a matter of public policy. They rely on *Cariveau v. Halferty* (2000) 83 Cal.App.4th 126 (*Cariveau*) and *D'Arrigo Bros. v. United Farmworkers of America* (2014) 224 Cal.App.4th 790 (*D'Arrigo*). In *Cariveau*, the client of a securities dealer sued

the dealer for damages arising from the dealer's misconduct. The parties settled and their settlement agreement included a confidentiality clause that required the client not to disclose the underlying facts " 'to any public or private person or entity, or to any administrative, law enforcement or regulatory agency.' " (*Cariveau*, *supra*, 83 Cal.App.4th at p. 129.) After the client complained to the dealer's employer, the dealer was fired and investigated by the National Association of Securities Dealers (NASD), which ultimately fined, censured, and barred the dealer from associating with a member of the NASD. (*Id.* at pp. 129-130.) The dealer then sued the client for breach of the confidentiality clause. The Court of Appeal held that the clause was unenforceable as a matter of public policy. The court explained that the clause "required suppression of information that [the dealer] was required to report to her employer and the NASD," and allowed her to violate NASD rules and facilitate false reports to her employer. (*Id.* at p. 135.)

In *D'Arrigo*, the United Farm Workers (UFW) stipulated with an employer that the UFW would " 'not pursue, nor assist [in] pursuing' " a particular unfair labor practice claim. (*D'Arrigo*, *supra*, 224 Cal.App.4th at p. 796.) The general counsel of the Agricultural Labor Relations Board (ALRB) subsequently filed a complaint against the employer alleging a similar claim. The employer then sued the UFW for breach of its promise not to assist the general counsel in pursuing the claim. (*Id.* at p. 797.) In the context of the UFW's anti-SLAPP motion, the Court of Appeal held that "any interpretation of the stipulated language to prohibit UFW from cooperating with [the general counsel] in his investigation and prosecution of the [subject claim] must be rejected as contrary to the public policy inherent in the [Agricultural Labor Relations Act of 1975]." (*Id.* at p. 803.) Enforcement of the stipulation, the court explained, would interfere with the duty of the ALRB and its general counsel and was "contrary to the public interest in protecting the right[s] of

agricultural employees to designate their own representatives and negotiate the terms of their employment." (*Id.* at p. 806.)

These cases, Johnson argues, "immunize cooperating with and providing information to regulators, and invalidate as against public policy confidentiality agreements that restrain such cooperation. Pursuant to this doctrine, Johnson had a right to assist, cooperate with, and provide information to [the Department of Insurance] and DMHC in their administration of statutes and regulations, and any confidentiality agreement restraining such cooperation would be void as against public policy." This argument fails for the same reason as Johnson's *Noerr-Pennington* argument: Blue Shield is not suing Johnson for providing information to the DMHC or the Department of Insurance; it is suing him for disclosing confidential information to news reporters and the public.

Amicus curiae also relies on Labor Code section 1102.5, subdivision (a), which provides: "An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Lab. Code, § 1102.5, subd. (a).) This statute is inapplicable because Blue Shield has not sued to enforce a policy preventing disclosure to any of the persons or entities identified in this statute; its suit arises from Johnson's disclosure to news media and the public via his website.

II. Blue Shield's Motion to Seal Records

In support of his anti-SLAPP motion, Johnson filed his declaration and, pursuant to California Rules of Court, rule 2.551, lodged conditionally-sealed excerpts of his personal diary. The parties subsequently agreed to permit Johnson to conditionally seal his declaration and to file a redacted version of his declaration pending a motion by Blue Shield to seal the declaration and the diary excerpts. Blue Shield then applied ex parte to seal the documents on the ground that they contain information protected under the attorney-client privilege.

In granting the ex parte application, the court found that Blue Shield had established, through Jacobs's declaration, that "the relationship between Johnson and Jacobs was an attorney-client relationship" and that the proposed redactions to Johnson's evidence included "information covered by the attorney-client privilege." Johnson, the court explained, failed to show that Blue Shield had waived the privilege or any other basis for "determining that the privilege did not apply."

Meanwhile, Blue Shield filed a noticed motion to permanently seal the unredacted declaration and diary excerpts. After a hearing, the court granted the motion. Johnson contends that the ruling was error.

The basis for Blue Shield's motion was that Johnson's challenged statements reflected attorney-client communications between Jacobs and Blue Shield's employee, Johnson. That is a valid ground for sealing court records. (See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46, citing *Publicker Industries, Inc. v. Cohen* (3d Cir. 1984) 733 F.2d 1059, 1073; *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 108.) Blue Shield, as the party claiming the privilege, had "the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship." (*Costco Wholesale*

Corp. v. Superior Court (2009) 47 Cal.4th 725, 733 (*Costco*).) If, as the trial court found here, Blue Shield established the "facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence" and Johnson had "the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Ibid.*) We review the trial court's findings for substantial evidence. (*Id.* at p. 734.)

Blue Shield's motion is supported by Jacobs's declaration in which he described his and Johnson's discussions concerning Blue Shield's tax exemption strategy, communications between Blue Shield and the FTB, Blue Shield's legal structure, its duties as a social welfare organization, the Care1st acquisition, and Johnson's nonprofit status memo. These discussions, Jacobs explained, were "intended to further [Blue Shield's] legal analysis and strategy."

Blue Shield further supported the motion with a declaration of its counsel, Sarah Gettings, stating that the redacted portions of Johnson's reply declaration contained "nearly word-for-word recitations of attorney-client privileged discussions between Johnson and [Jacobs] on sensitive legal issues."

Blue Shield's evidence is sufficient to establish that the redacted portions of Johnson's declaration consisted of communications between Johnson and Jacobs made in the course of an attorney-client relationship and, therefore, subject to the attorney-client privilege. (See *Costco*, *supra*, 47 Cal.4th at p. 741; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 51.)

It does not appear from our record that Johnson submitted or relied on any material evidence in opposition to Blue Shield's motion other than the conditionally sealed records. Although he asserted below that "there is nothing covered by the attorney-client privilege in the redacted passages" and that Blue Shield had previously disclosed the purportedly privileged information,

he acknowledged that he could not back up these assertions without having the court view the evidence that was conditionally sealed. He did not, however, provide this court with the sealed documents or other evidence that might defeat Blue Shield's claim of privilege. He has failed, therefore, to satisfy his burden of establishing error.

Johnson further contends that the court failed to make the express findings required under California Rules of Court, rule 2.550(d).[8] It does not appear from our record, however, that he objected to the court's failure to make such findings and has therefore forfeited the argument on appeal. As one court stated regarding a similar failure and forfeiture: " 'It is clearly unproductive to deprive a trial court of the opportunity to correct such a purported defect by allowing a litigant to raise the claimed error for the first time on appeal.' " (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1066.)

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[8] This rule provides: "The court may order that a record be filed under seal only if it expressly finds facts that establish: [¶] (1) There exists an overriding interest that overcomes the right of public access to the record; [¶] (2) The overriding interest supports sealing the record; [¶] (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; [¶] (4) The proposed sealing is narrowly tailored; and [¶] (5) No less restrictive means exist to achieve the overriding interest."

DISPOSITION

The order denying Johnson's anti-SLAPP motion is reversed. The court is directed to enter a new order: (1) granting the motion to strike as to the words "and public disclosure" at page 7, line 5 of the complaint; and (2) denying the motion in all other respects.

The trial court's order granting Blue Shield's motion to seal portions of the reply declaration is affirmed.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.